SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 378

WATERMAN STEAMSHIP CORPORATION,
Petitioner

v.

JOSEPH SKIBINSKI, *Respondent.*

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF RESPONDENT

Motion for Leave to File the Accompanying Brief as Amicus Curiae in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMERICAN TRIAL LAWYERS ASSOCIATION
ARTHUR J. MANDELL

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Statement of Interest of Amicus Curiae

Arthur J. Mandell of Mandell & Wright, Houston, Texas, a member of the bar in this Court, and as Chairman of the Admiralty Section of the American Trial Lawyers As-

sociation and on behalf of the American Trial Lawyers Association, respectfully petitions this Court for leave to file a brief Amicus Curiae on behalf of Respondent herein, and if granted, for this Honorable Court to consider the arguments and cases in point following this Statement of Interest.

The American Trial Lawyers Association is a national bar association, consisting of more than twenty thousand lawyers, primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors in admiralty who specialize in maritime tort law, and particularly as it relates to maritime workers covered by the Longshoremen's & Harbor Workers' Act, 33 U.S.C., Sec. 901, et seq., as amended. These maritime workers, engaged as they are in an extremely hazardous industry,[1] have a real and direct interest in the outcome of this case.

Said Association, and particularly the Admiralty Section thereof, is vitally interested in the final outcome of this case, involving as it does the absolute and non-delegable duty to supply tools and equipment reasonably fit for the purpose to which they are put which a shipowner owes a Siercaki seaman, i.e., a longshoreman. Any relaxing of such duty would severely impair the rights of this group of workers for whom the Congress and the courts have shown a great deal of concern.

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[1] The House Report accompanying the 1958 Amendment to the Longshoremen's and Harbor Workers' Compensation Act points out that stevedoring is the most hazardous of all industries which report their experience to the Bureau of Labor Statistics, having an injury frequency rate seven times that of manufacturing (1958 U.S. Code and Cong. News, p. 3843, Sec. 41 of the Act [33 U.S.C.A., Sec. 941(a)]).

It is of paramount importance to hundreds of thousands of harbor workers that the established duties as announced by this court remain unimpaired and undiluted by sophistry or rhetoric.

For the foregoing reasons, it is respectfully prayed that this Honorable Court accept this Brief Amicus Curiae.

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of
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Brief of Amicus Curiae Admiralty Section of American Trial Lawyers Association in Opposition to Petitioner's Application for a Writ of Certiorari

The American Trial Lawyers Association views the attempt of the Petitioner and that of the amicus curiae American Merchant Marine Institute, Inc. to weaken and/or dilute the established absolute and non-delegable duty to supply longshoremen with tools and equipment reasonably fit for the purpose to which they are put as a serious threat to the safety and the welfare of the thousands of workers engaged in loading and discharging vessels throughout the United States.

The holding by the trial court and the Court of Appeals in this case that the use of an open hook to lower the ladder into the hatch and place it in position, constitutes unseaworthiness as a result of which a longshoreman was injured, is supported by decisional law as announced by this court and the many Courts of Appeal. Any departure from these well-established legal principles would represent a direct threat to the safety of those engaged in this hazardous industry. The trial court's judgment and that of the Appellate Court are proper and in accordance with the applicable law.

QUESTIONS PRESENTED

Under the admitted factual situation in this case does not the use of an open mouth "S" shaped cargo hook under the top rung of the ladder in order to lower it through the hatch and place it in position, render that hook not reasonably fit for the purpose to which it was put.

Petitioner disregards or fails to take into consideration this court's holding that while a shipowner may contract the loading and/or discharging of a vessel to others, i.e. stevedores, in so doing it cannot contract away its absolute and non-delegable duty and obligation to provide tools and equipment reasonably fit for the task to which it is put. As this court has said, while a shipowner may take advantage of the more modern method of division of labor, in doing so it cannot contract away its obligation. *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872 (1946). There is no doubt, indeed it is conceded, that the use of the open mouth "S" hook was not suitable for the task at hand. Simply because a closed shackle with a locking pin device closing off the open end was available does not relieve the shipowner of its absolute and non-delegable duty even though the ship's unseaworthiness is created not by its own acts but rather by the acts or negligence of a third party specifically engaged to do specialized work aboard a vessel. *Mahnich v. Southern Steamship Co.,* 321 U.S. 96, 64 S.Ct. 455; *Neal v. Lykes Bros. Steamship Co., Inc.,* 306 F.2d 313 (C.C.A. 5th Cir., 1962). Petitioner and its amicus American Merchant Marine Institute, Inc. seek to insulate the shipowner's liability because the stevedoring company engaged to do this specialized work aboard ship used the improper and concededly unsuitable tool and equipment to lower and place in position the ladder into the hatch. This is precisely what this court has held that the shipowner cannot do. *Alaska Steamship Co. v. Peterson,* 347 U.S. 396, 74 S.Ct. 601, aff'g. 205 F.2d 478.

This court has held workers who do work traditionally done by seamen are entitled to the same protection as seamen. If Respondent Skibinski would have been a member of the crew of the MADAKET and another member

of the crew had selected the open mouth "S" hook to lower and place in position the steel ladder as a result of which he would have been injured, there would have been no question but that he would have been entitled to recover damages by reason of unseaworthiness as well as negligence. The fact that there was available a shackle on board the vessel which could have been used with safety, does not insulate the shipowner from liability. Simply because Respondent Skibinski was a longshoreman, or as one court referred to such worker, a Sieracki seaman,[2] does not, as this court has declared, lessen its obligation. Are not these longshoremen subjected to the same danger and therefore entitled to the same treatment under the law? *Pope & Talbot v. Hawn,* 346 U.S. 406, 74 S.Ct. 202. To do otherwise would lessen, if not destroy, this court's holding that the warranty of seaworthiness is absolute in its nature and the failure to fulfill such warranty gives rise to liability because it is essentially a species of liability without fault, i.e., a form of absolute duty owed to all within the range of its humanitarian policy. If unseaworthiness created by the longshoreman himself resulting in his injury, liability is imposed, then it goes without question that if the negligence of its fellow longshoremen create an unseaworthy condition then there is greater reason for imposing liability. *Grillea v. United States,* 232 F.2d 919 (C.C.A. 2nd, 1956); *Holley v. The MANFRED STANSFIELD,* 269 F.2d 317, rev'g. 165 F. Supp. 660. We know of no case where an open hook instead of a shackled one was used, causing injury and liability for unseaworthiness has not been imposed. Indeed, *Cox v. Esso Shipping Co.,* 247 F.2d 629 (C.C.A. 5th, 1957)

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[2] Flowers v. Savannah Machine & Foundery Co., 310 F.2d 135 (5th Cir., 1962).

in effect holds that the use of such a tool to hold up a boatswain's chair constitutes unseaworthiness. The test as the trial court held is whether the open "S" hook was suited for the task at hand or to which it is put. If it was not, it was unseaworthy. This court in *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 81 S.Ct. 6 at p. 10 said "* * * whether the wrench furnished Michalic was a reasonable suitable appliance for the task he was assigned." In *Blassingill v. Waterman Steamship Corp.*, 336 F.2d 367 (1964), the court stated: "The tackle, however, was defective only in the sense that it did not perform the *work for which it was used.*" So here, the tackle was safe when used to handle two bales. The jury could find that it was unsafe when used to handle four. This would be because it was used in a hazardous manner. Citing *Crumady v. The JOACHIM HENDRIK FISSER* (1959), 358 U.S. 423, 79 S.Ct. 445. As in the case at bar, the open mouth "S" hook, while not defective, was not safe for the task to which it was put. See also *Beeler v. Alaska Aggregate Corp.*, 336 F.2d 108 (C.C.A. 9th Cir., 1964); *Candiano v. Moore-McCormack Lines, Inc.*, 251 F.Supp. 654 (1966). Use of a pontoon bridle instead of toggle bridles both which were supplied by the ship, rendered the vessel unseaworthy.

This court's opinion in *Albanese v. N. V. Nederl. Amerik. Stoomv. Maats, Respondent v. International Terminal Operating Co., Inc., Petitioner*, 86 S.Ct. 534 (1965), if as suggested by Petitioner as a holding repudiating operational negligence as grounds for recovery in view of the trial court's findings of no negligence, it is not pertinent in this case. The single question before this court is whether the trial court's finding of unseaworthiness is, under the facts, clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6 (1954). It is respectfully submitted, how-

ever, that the trial court could do little else except to find the open mouth "S" hook not reasonably suitable for the task at hand, i.e. unseaworthy. Indeed, under the facts, a finding to the contrary would be clearly erroneous.

The Amicus Brief In Support Of Petitioner Seeks To Establish Principles Rejected By This Court

Quarreling with this court's opinion in *Reed v. YAKA*, 373 U.S. 410, 83 S.Ct. 1349 (1963), the American Merchant Marine Institute seeks to nullify this court's principle laid down in *Seas Shipping Company v. Sieracki*, supra. It urges that this court reverse its decision because the industry is under stringent economic pressure that none of its components can absorb the additional cost of increased insurance and that the shipowner in turn must and does pass along this additional stevedoring charge to its customers. But this court weighed and considered the same argument in *Seas Shipping Company v. Sieracki*, and answered it as follows:

> "* * * (shipowner) is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear the cost. (Parenthesis added)
>
> "These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, * * *.
>
> * * * It is a form of absolute duty owing to all within the range of his humanitarian policy."

Poignant v. United States, 225 F.2d 595 (C.C.A. 2nd, 1955); *Grillea v. United States*, supra.

The argument to the holding in this case the court below saddled the shipowner with an obligation to supply "an accident free ship" is wholly inaccurate. This court in *Morales v. City of Galveston*, 370 U.S. 165, 82 S.Ct. 1226 (1962) has laid down the rule as to the meaning of "an accident free ship".

CONCLUSION

The trial court's holding of unseaworthiness is not clearly erroneous. On the contrary it is supported by well established principles and respected authority from this and Appellate Courts. The great concern expressed by the courts and the Congress for the safety of these workers in such hazardous industry require the decision of the trial and Appellate Court remain standing.

It is, therefore, respectfully prayed that Petitioner's Application for Writ of Certiorari be in all things denied.

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION

By

Arthur J. Mandell
Chairman, Admiralty Section
American Trial Lawyers Association
Attorney for Amicus Curiae

DATED at Houston, Texas, this the 4th day of October, 1966.

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of October, 1966, copies of the above Application to Appear as Amicus Curiae and Brief in support thereof have been forwarded to:

Mr. William A. Blank and Mr. Wilfred L. Davis, Attorneys for Respondent, 66 Court Street, Brooklyn, New York, 11201, whose consent to file this application has been obtained, at their office and post office address, 66 Court Street, Brooklyn, New York, 11201;

Mr. Sidney A. Schwartz and Mr. Joseph Arthur Cohen, of Alexander, Ash & Schwartz, Attorneys for Waterman Steamship Corporation, Petitioner, who has not consented to the filing of this application, at their office and post office address, 76 Beaver Street, New York, New York 10005;

Mr. Cornelius P. Coughlan, Counsel for American Merchant Marine Institute, Inc., Amicus Curiae, 11 Broadway, New York, New York 10004.

Arthur J. Mandell